No. 09-451

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

TRAVIS SAULSBERRY and LORETTA JAMES,
in their individual and official capacities,

Petitioners,

v.

LORRI MYERS,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

SUPPLEMENTAL BRIEF FOR PETITIONERS

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SUPPLEMENTAL BRIEF FOR PETITIONERS

On February 9, 2010, the United States Court of Appeals for the Ninth Circuit Court issued its opinion in *Bull v. San Francisco.*, ___ F.3d ___, Appeal No. 05-17080. Petitioners respectfully submit this Supplemental Brief pursuant to Rule 15(8) of the United States Supreme Court Rules to call the Court's attention to that opinion.

I. Background Of *Bull v. San Francisco*

Bull v. San Francisco ___ F.3d ___, Appeal No. 05-17080, arose from a class action lawsuit challenging San Francisco's policy of strip searching arrestees who were to be introduced into San Francisco's general jail population for custodial housing. Under San Francisco's policy, the arrestee

> was required "to remove or arrange some or all of his or her clothing so as to permit a visual inspection of the underclothing, breasts, buttocks or genitalia of such person." The search included "a visual inspection of the mouth, ears, hair, hands, skin folds, [and] armpits as well as a thorough search of all clothing items."

Bull, slip op. at 2247, citing to and quoting San Francisco Sheriff's Dep't. Procedure No. E-03, E-03(III). Therefore, as were the visual body cavity searches in *Bell*, the visual body cavity searches in *Bull v. San*

Francisco were much more invasive than the brief visual search which occurred in this case.[1]

The district court held that the policy violated the Fourth Amendment rights of the persons searched. On appeal, a panel of the Ninth Circuit initially affirmed the district court's decision. *See Bull v. City & County of San Francisco*, 539 F.3d 1193 (9th Cir. 2008).

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1. In fact, the instructions for the persons performing the searches in *Bull* included the following:

3. The searching officer will instruct the arrestee to:

   a. Remove his/her clothing.

   b. Raise his/her arms above their head and rotate 360 degrees.

   c. To bend forward and run his/her hands through his/her hair.

   d. To turn his/her head first to the left and then to the right so the searching officer can inspect the arrestee's ear orificese. To open his/her mouth and run his/her finger over the upper and lower gum areas; then raise his/her tongue so the officer can inspect the interior of the arrestee's mouth. Remove dentures if applicable.

   f. To turn around and raise first one foot, then the other so the officer can check the bottom of each foot.

4. The searching officer will visually inspect the arrestee's breasts, buttocks, and genitalia.

5. The searching officer will thoroughly search the arrestee's clothing, underclothing, shoes, and socks.

6. At the completion of the search, the searching officer will instruct the arrestee to dress.

However, the Ninth Circuit then granted rehearing en banc. After re-examining the facts of the case in light of this Court's precedent set in *Bell v. Wolfish*, 441 U.S. 520, 558, 99 S.Ct. 1861, 60 L.Ed.2d 447 (1979), the Ninth Circuit Court of Appeals concluded that San Francisco's policy did not violate the arrestees' constitutional rights.

II. The Ninth Circuit's Opinion Further Supports Petitioners' Argument That, Pursuant To *Bell*, The Visual Strip Search Of An Arrestee Without Individualized Suspicion Is Constitutional.

In *Bull*, the Ninth Circuit relied upon this Court's analysis in *Bell v. Wolfish* to conclude that the relatively invasive visual strip searches of arrestees without reasonable suspicion were constitutional. In its analysis, the Ninth Circuit reiterated this Court's statement that jails and detention centers are "unique places fraught with serious security dangers." *Bull*, slip op. at 2243, *quoting Bell*, 441 U.S. at 559. Based on these characteristics, the Ninth Circuit recognized that essential goals of detention centers included maintaining institutional security and preserving order and discipline. *Bull*, slip op. at 2253, *citing Bell* at 546. Thus, as the circuit court stated, courts must be intent on giving wide-ranging deference to prison officials and may not substitute their own views on maintaining jail safety and security for those of jail administrators. *Bull*, slip op. at 2254, *citing Bell* at 547.

As the Ninth Circuit stated, in *Bell*, this Court determined the jail's policy of performing visual body cavity strip searches without individualized suspicion was reasonable not only to discover contraband but to

actually deter the smuggling of weapons, drugs, and other contraband. *Bull*, slip op. at 2255. This Court upheld the detention center's policy in *Bell* even though there was no long or pervasive history of the smuggling of contraband into the jail. *Bull*, slip op. at 2255, *citing Bell* at 559. In addition, as this Court stated in *Bell* and as the Ninth Circuit recognized in *Bull*, the severity of the arrestee's charges is not relevant to the analysis. *Bull*, slip op. at 2264.

After the Ninth Circuit considered this Court's guidelines from *Bell*, it held that its previous decisions failed to give sufficient weight to *Bell* and that it had, in fact, inappropriately substituted its judgment for that of corrections officials. *Bull*, slip op. at 2262-2267. According to the Ninth Circuit, its earlier decision in *Giles v. Ackerman*, 746 F.2d 614 (9th Cir. 1984), had improperly focused on such factors as whether reasonable suspicion existed, whether the strip search was absolutely necessary to protect the facility's security, whether the arrestee's charges were serious, whether the county had demonstrated a serious smuggling problem, and whether the county had demonstrated its policy had a deterrent effect. *Bull*, slip op. at 2262-2263. Likewise, in *Thompson v. City of Los Angeles*, 995 F.2d 1439 (19th Cir. 1989), the court had improperly focused on whether the arrestee's offense was sufficiently associated with violence to justify a strip search. *Bull*, slip op. at 2263, *citing Thompson*, 885 F.2d at 1447. As the Ninth Circuit stated,

> The Supreme Court [in *Bell*] did not require MCC officials to consider the individual characteristics of the persons subject to the

> strip search policy. Nor did the Court require MCC officials to articulate their suspicions that a particular person subject to the policy was smuggling contraband. Rather, the Supreme Court upheld a policy of strip searching all persons who had contact visits as categorical reasonable under the circumstances in the detention facility.

Bull, slip op. at 2263.

As the Ninth Circuit further noted, it had erred in concluding that arrestees charged with minor offenses posed no security threat. *Id. Bell*, in fact, had upheld searches of individuals who had not been charged with any offense whatsoever. *Bull*, slip op. at 2264. As the *Bull* court noted, persons who have been arrested and are being introduced into jail, as opposed to detainees who are engaging in contact visits, also have "plenty" of access to contraband from the outside and can conceal dangerous items on their person. *Bull*, slip op. at 2266. Accordingly, the Ninth Circuit decided that there was no meaningful distinction between the institutional concerns raised by contact visits in *Bell* and those raised by booking new arrestees into the jail. The court ultimately determined that San Francisco's policy requiring strip searches of arrestees even without individualized reasonable suspicion was reasonable under the Fourth Amendment. *Bull*, slip op. at 2271.

Just as the Ninth Circuit had done in *Giles* and *Thompson*, the Tenth Circuit inappropriately required reasonable suspicion to conduct a visual strip search of a pretrial detainee being booked into a jail in this case. (Petition for Writ of Certiorari, Appx. B at 26a-28a). However, the Tenth Circuit's requirement contradicts this Court's precedent set in *Bell v. Wolfish* and also is contrary to the Ninth Circuit's well-reasoned opinion in *Bull*.

III. The Ninth Circuit's Opinion Provides Further Grounds For Concluding That A Split Exists Between The Circuits.

As Respondent stressed, several circuit and federal district court decisions have required individualized suspicion prior to the strip search of an arrestee or have considered the inmate's placement in the jail or the severity of his crime. As Petitioners asserted, other courts issued decisions rejecting or questioning the reasoning in the decisions Respondent cited. *See Powell v. Barrett*, 541 F.3d 1298, 1300 (11th Cir. 2008) (upholding a policy requiring every person booked into the jail's general population to undergo a visual strip search, conducted without individualized suspicion to justify the search and regardless of the crime with which the person was charged); *Stanley v. Henson*, 337 F.3d 961, 962, 966-67 (7th Cir. 2003) (upholding as constitutional a clothing-exchange procedure that required inmates to disrobe in front of same-sex officers and put on jail-issued

uniforms); *Florence v. Board of Chosen Freeholders of County of Burlington*, 657 F.Supp.2d 504 (D.N.J. 2009) (granting the motion certifying the order for interlocutory appeal to the Third Circuit based on the decisive split regarding the proper application of this Court's opinion in *Bell*). Now the Ninth Circuit's issuance of the *Bull* opinion upholding San Francisco's policy of strip searching arrestees without individualized reasonable suspicion in accordance with *Bell* further underscores the fact that a significant split exists among the lower courts with regard to the strip search law.

Furthermore, as the Ninth Circuit reasoned, those decisions which required reasonable suspicion prior to the strip search of an inmate contradict *Bell* and are wrong. *Bull*, slip op. at 2267. As that court stated, the circuits which have made distinctions based on the severity of offenses, whether an individual was arrested or already in the jail, whether a significant smuggling problem has been demonstrated, and/or whether the jail has demonstrated a deterrent effect have made decisions inconsistent with *Bell*. *Id.*

CONCLUSION

Petitioners have demonstrated that the law regarding visual strip searches of arrestees is far from clearly established. The Ninth Circuit's recent decision in *Bull v. San Francisco*, __ F.3d __, Appeal No. No. 05-17080, further underscores the lack of clarity in the law regarding this issue. The Tenth Circuit Court of Appeals' opinion in this case failed to give sufficient weight to *Bell* and improperly substituted its judgment for that of corrections officials. *See Bull*, slip op. at 2263, *citing Bell*, 441 U.S. at 540 n.23. Thus, because Petitioners Saulsberry's and James' actions did not violate clearly established law, both were entitled to qualified immunity.

Respectfully submitted,

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